IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 292.

TELLURIDE POWER TRANSMISSION COMPANY AND L. L. NUNN, PLAINTIFFS IN ERROR.

vs.

RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

Brief of Plaintiffs in Error in Opposition to Motion to Dismiss.

This suit was originally brought on the part of the defendant in error to quiet the title to a little strip of land two hundred feet wide in Provo Canyon. The land belonged and belongs to the United States. The plaintiff claimed possession, or right of possession, acquired under the railroad act of March 3, 1875, Supplement to Revised Statutes, page 91.

In answer to this suit of the Rio Grande Western Railway Co. defendants alleged that they were attempting to exercise an authority under the United States. That that authority was given under the mining act of 1866 and is contained in Revised Statutes of the United States 2339:

> "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of

courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damages."

The District Court of Utah decided against the validity of the authority thus claimed to be exercised. That decision was affirmed by the Supreme Court of the State of Utah and this writ of error is taken on the ground that the validity of this authority thus exercised and given by the United States Statute has been denied to these plaintiffs in error. The defendants in their answer allege this authority at great length. It is the sole and only defense claimed of title to the premises involved. The answer contains the following:

"That the Provo river, after leaving the Wasatch valley in Wasatch county enters into a canyon which is wide at various points therein and flows a distance of about 20 miles in said canyon before emerging into what is known as Utah valley, in Utah county; that said river in the spring time and periods of high water flows large quantities of water which are not used for agricultural or any other purpose, and which by means of said river flow down and escape into Utah lake, and that in the summer season and during the period of irrigation said river becomes low and flows but a small quantity as compared with the quantity therein in periods of surplus, as aforesaid; that said canyon is well adapted for a reservoir in which can be stored the surplus and unused waters, as aforesaid; that in periods of low water the amount so flowed down in said canyon is inadequate for the wants of the people residing in said Utah valley for agricultural and domestic purposes; that said

Utah valley is populous and contains many large cities and towns which require heating and lighting and power for manufacturing purposes, and within short distances of said canyon are large mining camps, in which many important and producing mines are operated; that in the operation of said mines and the machinery used about the same and connected therewith power is essential and necessary and is only obtained by the burning of coal and coke and at great expense; that the production of electrical power for the operation of machinery and plants for lighting, heating, and for manufactnring and other pursuits has become an important enterprise and one which is of immense advantage to all persons and localities, and is superceding other means of supplying the necessary power to carry on said pursuits; that said defendants for years have been engaged in acquiring water rights for power purposes, and in the year 1894 they entered upon said Provo canyon and had extensive surveys made with a view to determining whether power could be obtained with which to supply said towns and cities in said Utah valley and said mining camps, and also whether by reservoiring the surplus water additional power could be obtained and water obtained for agricultural and domestic purposes; that said surveys were prosecuted with diligence, and said defendants in said year determined to acquire in said canyon water rights for the purpose of generating electrical power and to irrigate the lands in said valley below; that the greater part of said lands in said canyon were unoccupied and unsurveyed and were, except in a few cases, of but little or no value except for the purposes designated by said defendants; that said defendants took possession of a large portion of the public domain lying in said canyon, and commencing at a point at or near what will be as nearly as defendants can determine when surveyed the southwest corner of the southeast quarter of sec. 27, in township 5 south, of range 3 east, and extending up said canyon and on both sides of said Provo river a distance of about 5 miles, for the purpose of con-

structing a reservoir thereon, and also took possession and entered into the occupation of other public lands below said point first mentioned for the purpose of constructing canals, flumes, and small dams in order to carry out the purpose and enterprise aforesaid; that the point first mentioned in said sec. 27 and the land above in said canyon, until the land then occupied by W. W. Ferguson was reached, was vacant and unoccupied at the time said defendants entered said canyon and they then and there took possession of the same and entered upon the actual occupation and possession thereof; that at or near said southwest corner of sec. 27, upon each side of said river, large cliffs of rocks projected from the mountain and approached close together in the bottom of said canyon and formed a suitable and proper place for the construction of a dam; that said defendants, after extensive surveys had been made, began in the year 1895 the construction of a flume and commenced the necessary excavations therefor, in order to obtain power with which to aid in the construction of a large dam at the point aforesaid by which to reservoir and hold back the waters of said river for power and irrigation purposes; that defendants had the necessary surveys for canals made for the purpose aforesaid and surveyed a reservoir site, beginning at or near the point where said rock cliffs projected into said cliffs, and showed upon the suveys so made the contour of the line of said reservoir and prosecuted with due diligence the work necessary for the construction of the enterprise entered upon.

"Defendants further aver that in the winter of 1896 and in the early spring of 1896 they vigorously prosecuted said work and expended large sums of money in said surveys, flumes, excavations, etc.

"Defendants further aver that long prior to the time when plaintiff alleges it entered into said cayon they in good faith entered upon said public, unsurveyed land of the United States with the design and specific purpose of constructing in said canyon, at the point aforesaid, a large and expensive dam by which to reservoir and store said

surplus waters of Provo River; that they surveyed said reservoir, extending the lines of survey up said river from said point at or near Sec. 27, in Utah County, to a point at or near the northeast corner of the northeast quarter of southwest quarter of sec. 27, township 5 south, range 4 east of Wasatch County, Utah, and duly marked upon the ground the contour of the line of said survey.

"Defendants further aver that they have located a reservoir, the necessary canals connecting with said reservoir, and that since the year 1894, as aforesaid, they have been in the actual, notorious, visible and peaceable possession and occupation, except as stated hereafter, of the lands described in plaintiff's complaint and between the points aforesaid, as well as the land lying west and below in said canyon, where surveys for canals and flumes have been made, except the claim of W. W. Ferguson, lying in said canyon, has been occupied by said Ferguson, but defendants allege that they have contracted to purchase the same from him and have paid him a large sum of money therefor.

"Defendants allege that they during all the period aforesaid have had open notorious possession thereof; that said possession has been actual and bona fide and with the full knowledge of the said plaintiff, and that the said plaintiff well knew, long before the time alleged in said complaint of its entry into said canyon, that defendants were in possession of said public domain and were engaged in the construction of flumes and dams and a reservoir for the purposes herein stated. Defendants aver that in good faith they have prosecuted with vigor the enterprises engaged in and have expended a large sum of money, to-wit, more than $50,000 in said enterprise, and that it has been and now is their intention and purpose to complete said dam, and to store the waters of said river in the reservoir so constructed, and to use the same for the generation of electrical power for heating, lighting, manufacturing and other purposes, and also to use said water for irrigation and domestic purposes.

"That by means of said dam they will be able to obtain more than 8,000 horse-power, which will be sufficient to supply said Utah County and the towns and cities therein with power for heating, lighting and manufacturing purposes and also said mining camps and will prove a great and lasting benefit to said cities and the persons using the same, and will aid in the development of mining, manufacturing and other industries which will prove of great advantage and benefit to Utah and its inhabitants.

"In addition thereto, defendants aver that by means of the water so stored and reservoired they will be able to supply water for irrigation purposes, and that large quantities of unoccupied and sterile public land will be brought into cultivation, to the permanent advantage and prosperity of the State.

"Defendants further allege that said plaintiff, some time in the summer of 1896, wrongfully and maliciously and for the purpose of annoying said defendants and interfering with their project and enterprise, came into said Provo Canyon and ran irregular, indefinite, and devious lines through a portion of said canyon, pretending that it was the purpose to establish a railroad therein; but defendants allege that said lines so run were so irregular, so uncertain, so shifting and changing as to indicate no such purpose; that in two or three points in said canyon various persons claiming to represent said plaintiff made slight excavations, but the character thereof was such as to indicate no purpose to construct a railroad or to perform intelligently or with a settled or fixed purpose any enterprise; but defendants upon information and belief allege that said plaintiff has no purpose or design to construct a railroad in said canyon, but that what has been done has been done with a view to annoy said defendants and to prevent them from constructing their reservoir and canals and from obtaining electrical power for the purposes aforesaid, and also for the purpose of preventing any legitimate railroad undertaking from being consummated if the operation of a

line through said canyon was essential to said undertaking * * * *.

"Defendants further allege that they are in the actual possession of the land described in said complaint and have been for more than two years last past, as well as other lands in said canyon, as above set forth, and that while in such possession and while eugaged in the construction of dams, canals, flumes, reservoirs and in the making of surveys, and while in the actual, peaceable notorious and open possession of said unoccupied public domain, persons claiming to represent the said plaintiff entered said canyon in the summer of 1896 and pretended that they desired to survey across said land, and while the defendants were so engaged and so in possession as aforesaid said persons ran indefinite and uncertain lines through a portion of said canyon.

"Defendants further allege that said plaintiff nor any other person has any right to intrude upon their possession and occupation of said lands described in said complaint or to prevent them from carrying out their enterprise so important and beneficial to the people of Utah.

"Defendants further allege that to complete their said enterprise and said work the completion of said dam is necessary and the reservoiring of said water in said canyon is absolutely imperative, and that if said plaintiff or any other person shall construct a railroad in said canyon it will prevent the completion of said dam and reservoir, and will absolutely destroy the said enterprise upon which defendants have entered, and they will be despoiled of the rights and property acquired by them and will suffer great and irreparable damage and injury. Defendants aver that said enterprise and the work so undertaken by them and the site thereof are of great value, to-wit of the value of more than $500,000.00, and that if a railroad were constructed along the bottom of said canyon they would be damaged in a sum in excess of that amount; that the construction of said dam and reservoir and the creation thereby of electrical power for the purpose aforesaid and to the extent aforesaid, and the obtaining of water for agricultural and domestic purposes as

> aforesaid, are of higher and infinitely greater importance than the construction of a line of railroad through said canyon, and the exercise of the right of eminent domain contended for by plaintiff in said complaint, over the land in said complaint described would prevent the defendants from completing said work and render valueless all that they have done."

It will be thus seen that the question of the right to build a dam and flume and take possession of the land involved in this case for that purpose is directly, fully and freely averred.

I.

It is claimed on the part of the defendant in error moving to dismiss that there is no sufficient pleading alleging an authority under the United States. That the record does not show that the defendant claimed to exercise this authority of the court of original jurisdiction. The reading of the previous pages of the answer completely disprove statements of this motion to dismiss from the allegation of authority there set forth, the entering upon the ground, the digging of the ditches and the beginning to build the dam. It was not necessary under the practice of Utah or laws of the United States to plead specifically the statute, under which the claim was made. The pleading under the code system of Utah must consist of the ultimate facts not of the conclusions of law. The statute is a general one and a general law of the United States. The court takes judicial notice of it without its being pleaded.

Cronall vs. Randall, 12 U. S. 164.

Phillips Pr. 173.

Bridge Proprietors vs. Hoboken Co., 1 Wall. 116.

The record shows that this *authority* was drawn in question both on questions of fact and on question of law. It is not necessary that the *validity of the statute* should be drawn in question, but only the *validity of the authority* exercised by the plaintiff in error. Counsel in motion to dismiss argued and quoted authorities that if the decision passed on any other issue than that of the validity of the authority then no writ of error would lie. The counsel reviews the cases where the authority exercised was necessarily involved. It is not sufficient to say there was no dispute but what a dam might have been built under some circumstances. A dispute on that question would simply be a dispute as to the validity of the statute. The issue in this case was: Did these defendants, plaintiffs in error, have authority to build and construct a dam in Provo Canyon? That is a question of applying the facts to the statute. A decision against the validity creates a federal question and permits a person against whom the question is decided to bring it to this court.

There are no other statutes to which this pleading could be referred than that which has been quoted from the United States Revised Statutes. If the state had passed any act on that subject it would be inoperative because neither the Territory nor the State could control the disposition of the lands of the United States, these canyons. However there is no state statute on the subject whatever. The territory never assumed to pass laws on that subject. Attention is specifically called to the statement at page 24 of the Motion and Brief to Dismiss in which it is stated that the state and federal statutes on the subject are identical and that there is a general law of the State of Utah providing the same as the United States statute. Quoting the Compiled Laws of Utah, 1888, Vol. 1, page 216. The very learned counsel who prepared the motion had better

re-read that page, and he will find, as your honors already know, that the compiler of the laws of 1888 copied into the statutes of the Territory of Utah for convenience the statutes of the United States specially applicable to that territory. A reference to that volume will show that printed in it is the Organic Act passed by the Congress of the United States authorizing the existence of the Territory of Utah, and that then other acts followed which are supposed to affect the organization and direction of the Territory. That the first 242 pages of the first volume of the Compiled Laws of Utah contain, and contain only, the Acts of the Congress of the United States. The entire land law of the United States is there copied. Why did the learned counsel quote and assert to this court in its brief that these were the laws of the state, and that we failed to plead whether we were acting under the state or the United States laws?

II.

The validity of this authority on part of defendants, as exercised was necessary to the decision. It must be remembered that neither the original plaintiff nor the defendants had ever completed their respective enterprises. Both were inchoate and incipient. The plaintiff in this case said it intended to build a railroad. It never did construct a railroad. It has never taken possession with a railroad of any of the land of the United States. What it did, in fact, was to run a preliminary survey and place stakes along where that survey was to be. This was the sole completion and evidence of title in plaintiff, defendant in error. What the defendants in the original action did was to dig ditches and prepare the ground for building dams. Each was exercising an authority under a specific statute of the United States upon the land of the United

States. Neither had completed their right. The questions then in the case were, first, one of fact, which was prior in point of time in entering upon the work involved? It was not necessary to say which would be prior in completing the work, nor could that future fact ever be determined. The rights of the party who fulfilled his enterprise would relate back to date from the first act. It was important, which in point of fact did work first, the defendants with their dam and ditches, or the plaintiff with its railroad. The findings of fact on this subject will be conclusive so far as they are truly and merely *findings of fact.* Mere conclusions of law, argument and opinions thrust into the findings by the trial judge have no weight or effect in construing the findings.

Turn to the findings of fact as to which actually commenced work first. We call attention to numbers 12, 13, 14, 15 and 16. They are too long to be re-quoted here, but from them we find these substantial facts: *That the defendant Nunn began in the fall of the year 1894 work tending and for the purpose of utilizing Provo Canyon for a power dam. That during the year 1895 that work was prosecuted.* And at the bottom of page 17 we find that—

> **"On the 5th day of June, 1896, he completed a survey of the contour of a reservoir on the 85 foot level from Hanging Rock, which was made with an angle line, and at the point of beginning and at each angle of the line a stake was set and marked 'Water level, Provo Canyon reservoir.'"**

Other work is fully described; flumes that were made in the spring of 1896; ditches that were begun in 1895 are then described in the findings of fact. These are proper findings, questions involved in the issue and are facts in this case. Some of the findings of fact state that

the work of the plaintiff, defendant in error, was commenced the 23rd day of March, 1896. (See 5th and 8th Findings.) That—

> "Prior to the 8th day of July, 1896, the plaintiff surveyed for a change of alignment from the north to the south side of the river for a distance of about four miles, and *about the first of July, 1896*, adopted the change in alignment and moved the graders, who were then at work, from the north to the south side of the river, and they commenced work on the particular strip of land described in the complaint and continued to work there until stopped by the defendants, as set forth in the complaint." (P. 14, Fol. 30.)

The particular piece of land involved in this suit was within the contour line of the survey, which was completed on the 5th day of June, 1896, as shown by the maps. It was on the south side of the river and the plaintiff, *defendant in error, never thought of taking, never began to take it, never attempted to survey it and never stuck a stake upon it until* **July, 1896.** This is a finding by the court clearly showing the priority in taking possession of this land for future development on the part of the defendants, plaintiffs in error.

The argument of counsel on motion to dismiss that the facts have been found against us is untrue. The record shows that the facts were found with us. It is a fact however not to be denied that the court added among the findings of fact his conclusions of law, that the defendants had never taken possession or had possession of the land in controversy and that the plaintiff had possession, had the right to the land in controversy (Findings 25 and 26). But, in the face of the actual facts already fully stated in the findings, this conclusion of the trial judge was a contradiction of those issues which he had found before and the conclusions were not warranted. This court is bound by the

findings of fact and not by the conclusions of the judge herein. *Start then with the proposition that these plaintiffs in error were prior in point of time.*

Where a discrepancy exists a specific finding will control one more general. In the case of Geer vs. Sibley, *infra*, the court says:

> "Where a general finding of fact is drawn as a conclusion of fact from special findings of fact which precede it, and which are inconsistent with the general conclusion of fact, the special findings will control the general finding, and a judgment supported by the general finding but not by special findings, will be reversed upon appeal as not being supported by the findings."

Geer vs. Sibley, 83 Cal. 1.

Warder vs Enseln, 73 Cal. 291.

Hidden vs. Jordan, 28 Cal. 302.

A conclusion of law cannot be regarded as a finding.

Smith vs. Smith, 62 Cal. 466.

Walker vs. Buffandean. 63 Cal. 312.

Paulson vs. Nunan, 64 Cal. 290.

If findings are inconsistent and cannot be harmonized it is ground of reversal.

Sloss vs. Allman, 64 Cal. 47.

Manly vs. Howlett, 55 Cal 94..

Gilman vs. Curtis, 66 Cal. 116.

Kearns vs. McKean, 65 Cal. 411.

III.

Plaintiffs in error having entered upon the work in 1895, and prior to the work comtemplated by the defendant in error had the right of possession under the statute of the United States to continue and prosecute their work until it would be completed. The statute gives the right when

completed, possession during the work of completion is a necessary incident and part of it. The privilege of entering upon the land of the United States, the privilege of using the land of the United States until the work can be completed is necessarily given. It is theirs when the dam shall be built and the flumes are prepared. It is theirs to work upon and build upon until that time shall arrive.

IV.

It was stated by the trial judge in one of his findings of fact that (though that is also a conclusion) see finding 27:

> "A dam that would raise the water 85 feet at Hanging rock or any dam higher than one 15 feet high at Middle rock would be unnecessary, and not in accordance with the customs and conditions of the country, hampering and thwarting other interests and enterprises of a public character from passing through this important gateway leading to the eastern portion of our country, and a higher dam in this locality is unnecessary in an adjustment of the relative rights and interests of the parties and of the public interests in the use of said canyon."

But although called a finding of fact this is a decision against the validity of the efforts on the part of the plain- in error to establish a power dam for the purpose of manufacturing electricity. The Judge not only holds that an 85 foot dam would be unreasonable and unnecessary, but that any dam whatever would not be in accordance with the customs and conditions of the country. This cannot be a question of fact but is a conclusion of law. The expression in the statutes "Customs, laws and decisions of courts" refers to the method of acquiring title and not to the conclusion of the right. If the local law had provided for a notice of a particular character, as the laws of Idaho and Nevada and some other states do, that notice must be fol-

lowed. If it were the local custom to do a certain amount of work in each year that custom must be followed. The expression in the law does not mean that local interests govern the grant of right. The grant of right is for "agricultural, mining, manufacturing or other useful purposes." It must be exercised according to local rules, if there are any, but local rules or local interests could not prevent the exercise of it. In the State of Utah there are no local rules. There is no provision of statute law or district law or law of any kind providing for notice to acquire water rights. *No notice whatever was ever required. All that is required in Utah to perfect and complete a water right is to use the water, to go to work for the purpose of using the water.* If a man wishes to irrigate his farm and there is unappropriated water in the stream he acquires a right the moment he begins to work upon the ditch or dam to divert it. If he pursues that with diligence his right becomes perfected. The statute of the United States is broad enough to cover electricity. When it was first passed in 1866, the uses of electricity, as now being developed in all parts of the United States, were practically unknown. But the provisions of the statute include all future uses. Any useful purpose is within the scope of this statute. Electricity has become to-day a necessity. There is no reason why a dam should not be built in Provo Canyon and in every other canyon in the Rocky Mountains to develop electricity, unless it interferes with prior rights of some kind or character. Every citizen of the United States has the right to appropriate the powers and facilities of nature existing on the lands of the United States so long as he interferes with no other prior rights.

This last finding of fact of the court seems to include many other questions but in all mere conclusions; he speaks of "thwarting other interests and enterprises" of public character. Who made him custodian of "other in-

terests and enterprises of public character?" Not one of them is a party to this suit. If in diverting this water or building this dam Mr. Nunn interferred with any public highway or any public uses, the public will bring an action to restrain him; the public will take care of itself. It is time enough to determine those questions *when the public becomes a party.* The commissioners of the highways will take care of its highways. This 27th finding seems to be a stump speech injected into this case for the purpose of preventing the utilization of the waters of Provo Canyon for which the defendant, plaintiff in error, intended to appropriate it. There is not proof of any custom or any condition preventing a dam for the purpose of generating electrical power. There is no proof that it would either hamper or thwart other interests. There is no finding of fact on this subject. The finding that any dam is unreasonable shows that the court was unreasonable.

V.

It is not necessary that the highest court of the State should have passed in its opinion upon the validity of the authority exercised under the United States. It is sufficient that it was involved and necessarily involved: "that the judgment as rendered could not have been given without deciding it."

Eustis v. Bolles, 150 U. S. 366.

In other words the Supreme Court of a State cannot prevent a party from presenting his rights to this court by mere dodging. *If the question—the authority drawn in question is involved* then no form of subterfuge or any failure to render an opinion can deprive this court of jurisdiction. In fact the opinion itself has nothing to do with the jurisdiction. If the court had said we will not render an

opinion in this case, or if the Legislature had prevented their rendering an opinion in this case, the jurisdiction of this court would have remained the same. *It cannot be abridged by the State Legislature or State judges.* The Trial Court in this certainly directly denied the validity of this authority and the Supreme Court of the State have affirmed the action of the trial court.

Counsel who move to dismiss have quoted from that decision (Record pages 333 to 340) to show that the court did not in terms say that the authority of Nunn and the Telluride Power Transmission Co was invalid. It is true there is *nothing* decided in that opinion. The court carefully refused to decide any question of fact and painfully omitted to determine any point of law, but they affirmed the decision and the decision of this question, the right to build a dam, was the one issue in this case. No hiding will prevent this court from examining into it. That court does not decide that the facts found by the trial court that Nunn had commenced work in the year 1894 and had made a contour of the reservoir and staked it in June, 1896, prior to the location of this railroad line, was untrue and that being the truth it was necessary to the proper decision of the case to determine whether these defendants had the right to use the possession of the land for the purpose of constructing a dam. In the language pointed out by counsel they expressly decline to decide it. But that does not take away the jurisdiction of this court.

VI.

In the motion to dismiss we find a discussion of the rights of the defendant in error. I hardly conceive that upon the motion to dismiss, the court will consider the merits of the case. If the plaintiff in error had already acquired a right there is no statute which

permits the railroad to take it away. It must show that it had, (1), priority, (2), that it had complied with the statutes of the United States and, (3), of the State. We claim that it did not comply with the statutes of the United States, in not showing that the railroad, by some act, finding upon it, had selected its line of route. The statute consists of four sections. The first provides for a right-of-way through the mountains and other lands of the United States, but does not provide for their selection. The grant expressed in section 1 is ambulatory not fixed. Something else must be done to locate that right of way. First, it must file its articles of association with the Secretary of the Interior. That fact merely establishes that the company is one of those entitled to receive the benefit, not that it has received or selected any land. The method of selection is provided for by section four and by the terms of that, the company must select upon what particular line of the road of the public domain it wishes to exercise this right. The act of 1875, is not in the nature of any absolute grant to a particular company, it is simply an offer to the public, which takes effect and becomes operative as a grant to a particular company, only when its accepts its terms by a compliance with the conditions precedent prescribed in the act itself.

Red River & Lake of the Woods R. Co. vs. Sture, 20 N. W. 229.

To constitute a present grant there must be a present grantee qualified to take according to the terms of the law. His title does not vest until he has performed all conditions.

Hall vs. Russell, 101 U. S. 509.

Before a railroad company can acquire any rights under the act of 1875 as against one in possession of the

land in question, it must show a strict compliance with all the terms of the act.

Larson v. Oregon Ry. & Nav. Co., 23 Pac. 974.

Under this act no railroad company can claim to be a grantee of a right of way over the public lands, until a profile of its road has been filed and approved as therein specified. But even then the grant would not be operative upon lands to which private rights had previously attached.

Enoch vs. Spokane Falls & N. Ry. Co., 33 Pac. 966.
Spokane Falls & N. Ry. Co. vs. Zeigler, 61 Fed. 392.

Under the act of 1875 the filing of a profile of its line, is a condition precedent to the initiation of any right in the railway company's favor.

Lilienthal vs. Southern California Ry. Co., 56 Fed. 701.

And the rule is carried still further in the case of Jackson vs. La Monroe County, 46 N. W. 449, where it was held that the title to certain indemnity lands does not pass to a railroad company until the company select said lands and such selection has been approved by the Secretary of the Interior.

VII.

When the case shall be considered upon it merits we claim that the railroad company was not one of those that were authorized to occupy the ground of the United States because it was not the owner of a franchise from the state permitting it to build a road in that part of the state.

Plaintiff, defendant in error, was organized June 24, 1889, by consolidation of the Denver & State Line Railway Co., a corporation organized also by the consolidation of other corporations July 28, 1881. The statutes of Utah, provide among other things (Compiled Laws of Utah 1888, sec. 2358).

> "If such railroad company shall not within two years after the filing of its original articles of association begin the construction of its road, and expend thereon at least five per cent of the amount of its capital stock, and finish the road and put the same in full operation within ten years, its act of incorporation shall be void."

By the laws of 1892, page 58, there is added to this section the words "as to all parts of its charter lines not then constructed"; all compiled in the Revised Statutes of 1898, Sec. 438.

The Denver & Rio Grande Railway Co. as organized had twelve distinct branches, many of them paralelling each other. On many of them no work whatever has been done in 1896; on some of them, not at all connected or necessary to the construction of the branches, great deal of work had been done during the ten years. It is not pretended that within six or ten years after the organization of the progenitors of plaintiff any road whatever was finished because it is claimed by plaintiff that it has not yet completed any of its roads, it is still claimed to be in the process of completion under the original articles; it is shown that not one effort was made even to survey or build a single inch on this particular line of road for more than ten years after the organization of either of the progenitors of of plaintiff. We then have before us the question whether this provision is to be enforced against the railroad. The legislature placed it there for a wise purpose to prevent railroads marking out and claiming lands and routes which

they do not occupy and thus monopolizing and preventing other railroads from building on these routes; unless such companies intended to build and did actually build such railroad. The Act for the organization of railroads is a liberal one; it permits the railroad to select its entire route, but as a condition, it prescribes that it shall go to work on that route within two years, and complete it within ten. This provision is a condition precedent; the railroad can acquire no right until it shows that it has performed this condition precedent; it does not require action of the State to set aside any grant, or interfere in any manner; non-compliance with the condition of this statute is the same as if the right to build in this canyon, had never been granted to the railroad. The plaintiff could acquire no right in Provo Canyon, unless it had a charter from the Territory of Utah to build a railroad up there; its charters were granted more than ten years before any of the proceedings in this case; and it prescribed as a condition precedent that the road should be commenced within two years and finished within ten; it was not done; it therefore had no right whatever. The question has been decided in the following cases:

In re Brooklyn Winfield & Neuton Ry. Co., 72 N. Y. 245.

Bywaters et al. vs. Paris & G. N. Ry. Co., 11 S. W. 856.

The Oakland Ry. Co. vs. O. B. F. V. R. R. Co., 45 Cal. 365.

Morris-Esex Ry. Co. vs. Central Ry. Co., 31 N. J. Law 205.

Commonwealth vs. Lykens Water Co., 110 Penn. St. 391.

Peany v. Callis Ry. Co., 30 Maine 498.
Thompson's Corp., Secs. 6589, 6590, 6582, 6587, 6588.

Each line was separate and distinct from each other; each one as if it was a different corporation. Within the purview of this statute, each is segregated; the forfeiture can only apply to separate lines, and not to all. In Oakland Railroad Company vs. The Bakland, Brooklin and Fruit Vale Railroad Company, 45 California, 365, under a statute which provided that "if the provisions of this act are not complied with, then the franchise and privileges herein granted shall cease and be forfeited;" the company acting under that charter had built its railroad on certain streets on certain parts of the land, but had not built upon others; the right to those upon which it had not built was involved in the controversy. The court said:

> "No question arises in this case in reference to the plaintiff's right to maintain and use the railroad track constructed by it within five years after date of its grant. But no track having been constructed, and no steps taken towards constructing one along the east side of Broadway within the time limited by the act, the question is presented as to what rights the plaintiff acquired on that side of the street, and what, if any, it still retains." (Page 372.)

Holding in another part of the opinion, that the clause is self-acting as to streets not occupied.

While commenting upon the California authorities, I wish to call the court's attention to the fact that the case of Santa Rosa City R. Co. vs. Central St. Ry. Co., 38 Pac. 986, has not been published in the California reports as it is in the Pacific Reports. A re-hearing was granted in that case by the same bench that rendered the opinion, and subsequently the court divided equally upon the opinion,

so that no opinion was ever agreed upon in the California Court. (See same title, 112 Cal. 436.)

I call attention to the hardship that would be inflicted if it were the intent of the legislature, that all the lines should be forfeited or none. If it were true that that statute were to be considered to apply to the whole corporate existence and not to any particular line—then if the R. G. W. Co., did not complete all the roads described in its charter—20 odd lines—within ten years after its existence—all would be forfeited to the State—its property would be forfeited to the State, as well as all its rights—its corporate existence would cease. It cannot be that such an outrageous and unreasonable construction can be applied.

Sutherland on Construction, Secs. 323-324.

If, on the other hand, we consider that the statute meant that each particular line shall be forfeited unless completed within ten years, then such construction is just; it is just to the public and just to the because it is unable to keep the franchise open which it has not exercised or built upon, or begun the construction upon, anyone of these lines can be built within ten years—but the whole system could not, probably, be built within 100 years. The injustice to the railroad company in forfeiting its whole existence by failure to complete its whole system within ten years, would be equally great, whether we consider the clause self-acting, or as requiring the action of the State. This subject, however, is only referred to incidentally to show what might possibly be involved in the hearing of this case. We think it clear that plaintiff had no right under the State statute, but of course that is no ground for a petition for a writ of error or for maintaining jurisdiction in this court nor do we pretend or claim it. It is only to be considered because the counsel for motion

to dismiss have relied upon these merits and of the defendant to that is simply suggested.

VIII.

The plaintiff in error has also alleged that the court erred in not granting the motion to remove the cause to the United States Court. It appears that the usual motion was made on the ground of adverse to citizenship. No reason is given or suggested; none was ever given by the United States Court why said cause should not be removed The record is found, printed record pages 329-332. No sufficient argument has ever been presented why the case should not have been removed. Objection was made before the trial court to proceeding. (See bill of exceptions pp. 26, 27, folio 53.) It was not, however, presented to the Supreme Court in such a manner that that court passed upon it and if that is a fatal objection it would show there was no review of the jurisdiction on that ground. But we do not ask it on that ground. We pin our rights to a writ of error on this point, viz: the authority to build a dam and ditches in Provo Canyon under such was denied to us.

IX.

To summarize the position of counsel who moves to dismiss, we quote from the brief each ground for the motion. No. 1 (page 5):

> "Had the plaintiff, defendant in error, forfeited its charter from the State of Utah or any of its corporate rights thereunder, by a failure to commence the construction of one of its lines and its failure to complete and put in operation all of the line or lines of railway specified in its charter, within the times prescribed by the Statutes of Utah?"

This subject cannot possibly be a ground for dismissal which ever way it should be determined. In the last heading we have taken the trouble to consider it because it is argued in this case, but under any circumstances it is no ground for dismissal and we leave it there.

The second (page 9):

> "Had the District Court of the Fourth Judicial District of Utah and the Supreme Court of Utah jurisdiction to hear and adjudicate the case, in view of certain proceedings taken by the defendants The Telluride Co. and Nunn (plaintiff's in error) looking to the removal of the cause to the Circuit Court of the United States?"

This is one ground for reviewing the action of the Supreme Court, but not the only *ground nor the principal ground. The exact status of this branch of the question is this: The objection was made in trial court, but was not considered by the Supreme Court of Utah.*

The third ground is stated as follows, (motion to dismiss, page 13.)

> "Had the plaintiff (defendant in error) acquired the possession, the right of possession, or the inchoate title to the unsurveyed public land in question, subject to a condition subsequent, which may be performed at any time within a year after the government survey."

This like the first motion is not a ground of dismissal, but a question to be considered on the merits of the case. The plaintiff, defendant in error, has never acquired any possession or right of possession. It simply staked the ground for a railroad. If there was no prior right that would give it the privilege of perfecting a title to a railroad up the canyon. But the record shows that there was a prior right in the opposing party, plaintiff in error, which we will show and prove by oral argument on the hearing of this case.

The fourth ground and the only one really in controversy in this case is stated as follows: (Page 19)

> "Had the defendants (plaintiffs in error), or either of them, the possession of the land in dispute, prior to its appropriation by the plaintiff; or had they any right to hold it against the plaintiff?"

As stated, the question is one that goes to the merits, and the merits only. As argued, however, the jurisdiction in this court is raised and it is raised by the answer of the simple question: Was the validity of the authority under the United States to build a dam denied? The authority of these plaintiffs in error was denied and the validity of their proceedings was denied. The statements of fact in the brief are mistaken. The findings of the court below are that these plaintiffs in error were prior in point of time and had exercised their right and the conclusion was against the validity. This establishes the jurisdiction.

The court found priority in favor of plaintiffs in error, and all other facts necessary to the jurisdiction but denied the validity of the authority as a construction of law.

ARTHUR BROWN,
For Plaintiffs in Error.

H. P. HENDERSON,
WILLIAM STORY,
Of Counsel.

In the Supreme Court of the United States.

No. 291.

TELLURIDE POWER TRANSMISSION COMPANY AND L. L. NUNN, PLAINTIFFS IN ERROR.

vs.

RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to the Supreme Court of the State of Utah to review a judgment rendered in favor of the Rio Grande Western Railway Company as plaintiff in the court below recovered against the plaintiffs in error as defendants. The suit in the trial court was an action to quiet title to a specific piece of land lying in Provo Canyon, Utah County, Utah, two hundred feet wide by three thousand feet long. The plaintiff claiming that it had acquired a right of way and thereby sufficient title to maintain the action over that strip and the defendants were setting up an adverse title thereto. The complaint was in a general form permissible under the laws and practice of Utah alleging a claim of title in plaintiff; that the defendants set up some adverse claim, requiring the defendants to make it specific that the same might be adjudged invalid. The defendants Nunn and Transmission Company

by way of answer deny the title and rights and right of way of the plaintiff and alleged affirmatively that they the defendants had long prior to the attempt to survey any route on the part of the plaintiff taken steps to construct a dam in Provo Canyon, damming the river there and thus to create a large reservoir to be used for the purpose of generating electric power. They claimed their right to occupy the public domain, of which this particular piece of land was a part by virtue of section 2339 of the Revised Statutes of the United States:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

They thus claimed that they were exercising an authority given by the Statute of the United States. The answer very fully alleges the particular acts and dates when the defendants claimed their rights were initiated. Some question was raised on the motion to dismiss as to the suffiiciency of these allegations. As the allegations in the record are fully quoted in the answer to the motion to dismiss it is not deemed advisable to repeat them here. The plaintiffs in error claim that the allegations are ample to raise the question of their authority to build the dam and that the allegations show that the rights of the defendant were long prior to any attempt to create a

right on the part of the plaintiff, defendant in error. The court decided against the right of the said defendants, plaintiffs in error, which decision was affirmed by the Supreme Court of the State. In this manner we see that the validity of an authority attempted to be exercised under the United States has been denied, and that it was necessary to the decision. The trial Court found the facts at great length. Some of them it is claimed are contradictory. Some of the conclusions are contrary to probative facts found. The plaintiffs in error contend, that the probative facts found show that the rights of the plaintiffs in error were prior to those of the defendant in error. The plaintiffs in error contend that in 1894 Mr. Nunn, one of the original defendants began work with a view and purpose of utilizing the waters of Provo Canyon for a power dam. Provo Canyon has a large stream with rapid descent, capable of producing immense water power when properly developed. Defendant Nunn conceived that that power could be put to use by transmitting electric power; he had been engaged in that kind of enterprise, transmitting power by means of electricity, and for that purpose began in 1893 the inspection of the canyon with a view of utilizing it; in 1894, a more careful examination was made, in 1895, he began surveys, cut brush and in the same year, 1895, ran lines where his water flumes and courses would go, and made calculation of the power that he could obtain; prepared plans and maps for the purpose of doing work on those lines for the purpose of creating the power. In the spring of 1896, active operations toward building an immense power plant that should cost over a million dollars, were begun; the lines previously begun, were extended, brush cut, grades made and a large force of men put to work prior to March 1st, and a great many thousand dollars spent upon the enterprise. That

during the year 1895 work was constantly prosecuted. That prior to the date when the railway company surveyed its line at this particular point Nunn had located and done a large amount of work upon a reservoir and dam. That he designated the place where the reservoir was to be and had outlined it with stakes so as to be visible from everywhere and had completed the contour of the reservoir. The particular land involved is on the south side of the river. The railroad company began a survey for this particular line of road begining at Provo City on the 23rd day of March, 1896. Its surveying crew reached the vicinity of the land in question on or about the 10th day of April, 1896. Prior to the 1st day of July, 1896 the survey for the line of road had been on the north side of the river. On or about the 1st day of July, 1896 the surveying crew transferred its alignment from the north to the south side and this particular piece of land two hundred feet wide by three thousand feet long was surveyed early in July by them.

The court finds that in the fall of 1894 work was begun by Nunn and in 1895 it was prosecuted by Nunn (Findings 14, 15). That on the 25th day of April, 1896, a surveyor commenced and on the 5th day of June, 1896, completed a survey of the contour of the reservoir on the 85 foot level from Hanging Rock, which was made with an angle line, and at the point of beginning and at each angle of the line a stake was set and marked "Water level, Provo Cannon Reservoir," thus showing that on the 6th day of June, prior to the survey of the plaintiff on the 1st day of July that the defendants, plaintiffs in error, had taken actual possession of the land included in the reservoir. This particular piece of land was in the bottom of the reservoir and the reservoir and the railroad could not exist in the same place at the same time. The rights of the two

parties attempting to gain the right of way through the canyon were thus antagonistic, one claiming under the general law giving water rights on public lands and the right to occupy and use public lands for that purpose. The other claiming under the railroad law of March 3rd, 1871 whereby a railroad may acquire a right of way through canyons and other public lands of the United States. The contention over the rights of the parties on this subject constitutes the main controversy. The plaintiff in the court below, defendant in error, is a corporation existing under the laws of the then Territory of Utah. It was formed in 1889 by the consolidation of two other roads. The franchise for the building this particular line of road from Provo westerly having been created in one of the original companies more than ten years prior to the commencement of this suit. The consolidation, however had taken place in 1889 about seven years before the commencement of this suit. The statute of Utah provided, Compiled Laws of 1888, page 33, Sec. 2358:

> "If such railroad company shall not within two years after the filing of its original articles of association begin the construction of its road and expend thereon at least five per cent of the amount of its capital stock, and finish the road and put the same in full operation within ten years, its act of incorporation shall be void."

This was amended in the Session Laws of 1892, page 58 by adding to it:

> "As to all parts of this charter lines not then constructed."

The plaintiffs in error contend that that would be the true construction of the law without that amendment. The Statute of Utah as to consolidation provided also, Compiled Laws of 1888, section 2362, page 35:

"Upon the making and perfecting the said agreement and act of consolidation, as provided in the preceding sections, and filing the same as aforesaid, the several corporations parties thereto shall be deemed and taken to be one corporation, by the name provided in said agreement and act, possession within this Territory all the rights, privileges and franchises, and subject to all the restrictions, disabilities, duties and liabilities of each of such corporations so consolidated."

From this state of facts plaintiffs in error contend and did contend in the trial court and the Supreme Court of the State that the plaintiffs had no franchise to build a road up Provo Canyon at all, therefore it was not in the condition to accept the bounty of the government and was not authorized to receive a right of way from the United States. This constitutes the second contention in this case.

When the suit was commenced and prior to the filing of any answer or appearance the defendants asked for a removal of the cause to the United States Court. The Telluride Power Transmission Company was a corporation organized and existing under the laws of Colorado. L. C. Nunn was a citizen of Colorada. The trial court refused to remove said action to the United States Court and that action is alleged here as error. This point was not, however, called specifically to the attention of the Supreme Court of the State. This will constitute the third ground of contention in this suit. The plaintiff in error relies upon each of these grounds of contention in this argument and assignments of error. They are found in the record, pages 342-344 and are as follows:

ASSIGNMENTS OF ERROR.

1. The court erred in holding that said plaintiffs in error did not have a right to construct a dam 85 feet high

or other proper height for the purpose of generating water power with which to transmit electric power.

2. The court erred in holding that the right of said plaintiffs in error to erect a dam for the purpose of generating electric power was not prior and paramount to the right of defendant in error, plaintiff in the action below, to build a railroad.

3. The court erred in holding that said defendant in error, plaintiff in the action below, had acquired a right of possession to construct a railroad prior to the right acquired by plaintiff in error to construct a dam.

4. The court erred in sustaining the 20th finding of the district court that "a dam raising the water 85 feet at Hanging Rock would flow the county road to a depth ranging from 70 feet to one foot, and the expense of said road above said reservoir on the side of the mountain would be great, amounting to many thousand dollars."

5. The court erred in sustaining the decision of the district court in the 27th finding: "A dam that would raise the water 85 feet at Hanging Rock or any dam higher than 15 feet high at Middle Rock would be under all the circumstances surrounding this case, unreasonable, unnecessary, and not in accordance with the customs and conditions of the country, hampering and thwarting other interests and enterprises of a public character from passing through this important gateway leading to the eastern portion of our country, and a higher dam in this locality is unnecessary in an adjustment of the relative rights and interest of the parties and of the public interests in the uses of said canyon."

6. The court erred in sustaining the conclusions of law of the district court "that the plaiutiff, prior to the commencement of this suit, had the possession, right of possession, and the inchoate title, subject to a condition

subsequent, which could be performed at any time within a year after the Government survey, in and to the lands described in the complaint."

7. The court erred in sustaining the 3rd conclusion of law of the district court, "That the defendants have never had the title, possession or right of possession to said lands or any part thereof, or acquired any vested right in accordance with the laws or customs of the country, or any right to flow or otherwise occupy said lands or any part thereof or to prevent the use and occupation thereof by the plaintiff for railroad purposes, and that the adverse claim of the defendants to the said lands or to the possession or occupation thereof is unfounded and invalid."

8. The court erred in its 4th conclusion of law, "That the plaintiff (defendant in error) is entititled to judgment quieting and confirming its possession and right of possession of said lands as against the defendants and all persons claiming through or under them, and enjoining the defendants and each of them and all persons acting under them from interfering with the plaintiff (defendant in error) or interrupting it in the use and occupation of said lands, and from hindering and obstructing the plaintiff in the construction and operation of a railroad thereon and thereover; also enjoining the defendants (plaintiffs in error) and each of them from erecting a dam in Provo River at any point or place which will flow a railroad to be constructed by the plaintiff on the grade of the survey now made therefor on and over said lands."

9. The court erred in sustaining the judgment and decree of said district court wherein it is decreed "That the defendants have not, nor has either of them, at any time acquired or had any right, title, posssession or right of possession in or to said lands or any part thereof, or any right to flow the same by a dam in said river or otherwise,

and their adverse claim and the adverse claim of each of them to said lands and their claims of a right to flow or submerge the same isinvalid, and the title, possession, and right of possession of the plaintiff in and to said lands for a right of way for its railroad as against the defendants and each of them is hereby adjudged valid and confirmed and quieted."

10. The district court erred in proceeding to try said cause and take jusisdiction thereof after a motion had been made, which appears in the record, to remove said cause, and all proceedings subsequent to the filing of the petition and bond for removal were null, void and without jurisdiction.

11. The Supreme Court erred in proceeding to hear and determine said cause and confirm the said judgment after objection made to the jurisdiction of the State court and in rendering a judgment therein after the filing of the petition and bond for removal.

12. The court erred in holding that the plaintiff was authorized by law to build a railroad in Provo Canyon more than ten years after the original grant of franchise to the railroad company of which plaintiff was consolidated.

13. The court erred in holding that plaintiff was not required by the statutes of Utah to begin the construction of the line from Provo through the Provo Canyon within two years after the creation of plaintiff

14. The court erred in holding that the franchise of plaintiff to build the road through Provo Canyon had not been lost by lapse of time under the statutes of Utah.

ARGUMENT.

I.

It must be remembered in this controversy that neither the plaintiffs in error nor the defendant in error have a

completed enterprise. Each are proceeding to take initiatory steps under the authority given by the United States Statutes and each is contingent upon future conditions and acts and upon the result of this lawsuit. It is true that the plaintiff in error has not a dam built nor a reservoir, neither has the defendant in error any railroad. It has not anything except a line of stakes showing where a preliminary survey was run. No map nor profile no resolution of its board of directors accepting that line, no other possession, no other claim or right than that line of stakes. The facts we have already indicated show actual priority on the part of the plaintiffs in error, defendants below. The quotations from the finding we here repeat again. Folio 30, 8th finding.

> "Prior to the 8th day of July, 1896, the plaintiff surveyed for a change of alignment from the north to the south side of the river for a distance of about four miles, and about the 1st of July, 1896, adopted the change in alignment and moved the graders, who were then at work, from the north to the south side of the river, and they commenced work on the particular strip of land described in the complaint and continued to work there until stopped by the defendants, as set forth in the complaint."

And at the bottom of page 17, 16th finding:

> "On the 25th day of April, 1896, a surveyor commenced and on the 5th day of June, 1896, completed a survey of the contour of a reservoir on the 85 foot level from Hanging Rock, which was made with an angle line and at the point of beginning and at each angle of the line a stake was set and marked "Water Level, Provo Canyon Reservoir"

These two findings show beyond controversy the priority of the plaintiffs in error. It is true that subsequently in other findings the court has drawn the conclu-

sion that the railroad company was in possession and its rights were prior, but a mere conclusion will not stand in preference to a specific finding of fact. While this court follows the findings by the trial court and is considered bound by them it is not bound by inconsistent conclusions of fact. This is illustrated in Kahn vs. Smelting Co., 102 U. S. 641. See especially the language of Judge Field beginning at bottom of page 646.

Where a discrepancy exists a specific finding will control one more general. In the case of Geer vs. Sibley, *infra*, the court says:

> "When a general finding of fact is drawn as a conclusion of fact from special finding of fact which precede it, and which are inconsistent with the general conclusion of fact, the special findings will control the general finding, and a judgment supported by the general finding but not by special findings, will be reversed upon appeal as not being supported by the findings."

Geer vs. Sibley, 83 Cal. 1.

Warder vs. Enseln, 73 Cal. 291.

Hidden vs, Jordan, 28 Cal. 302.

A conclusion of law cannot be regarded as a finding:

Smith vs. Smith, 62 Cal. 466.

Walker vs. Buffandeau, 63 Cal. 312.

Paulson vs. Nunan, 64 Cal. 290.

If findings are inconsistent and cannot be harmonized it is ground for reversal.

Sloss vs. Allman, 64 Cal. 47.

Manly vs. Howlett, 55 Cal. 94.

Gilman vs. Curtis, 66 Cal. 116.

Kearns vs. McKean, 65 Cal. 411

2. The next question is do the statutes authorize the plaintiff in error to construct an 85 foot dam? Little

need be said upon this subject. The statute is broad and complete. The particular invention or uses of water are not necessarily to be stated in the act. Rights are given for "mining" "agricultural" or "other" purposes. It was not merely granted to gold mining or silver mining but *to any other purpose.* Water can only be handled by the erection of dams, ditches or flumes either for manufacturing or mining. The use of it contemplates that way and no other. The particular height is not limited. Because a man constructs a dam higher or larger than is usualy constructed it is no indication that it is not according to the local uses and customs. The court has attempted to say that an 85 foot dam would not be according to local customs and laws, but he has not found any custom prohibiting theuse of the water by damming, but on the contrary it is a known fact of common law that that is a common use of this country. It is the only way to use water and the mere height of the dam is not limited by the customs, or law or decisions of the court.

The only acts necessary to complete an appropriation of water in Utah are beginning of work with intent to appropriate and the diligent prosecution thereof afterwards. In some of the States of the arid region a notice is required to be posted at the point of diversion, but the statute of Utah is entirely silent on that subject; no notice whatever is required therefore. Any possession or work tending to show appropriation is of itself a notice and no other notice could be given, except that which was done in this suit, viz: cutting brush, sticking stakes, clearing land for flumes, ditches, building ditches all of which was being done by Mr. Nunn.

Pomeroy on Riparian Rights quotes from Kimball vs. Gearhart, 12 Cal. 97, the general rule:

> "In appropriating unclaimed water on the public land, only such acts are necessary, and such evidence of the appropriation required, as the nature of the case and the face of the country will admit are under the circumstances and at the time practicable. For example, surveys, notices, blazing of trees, following by actual work and labor, without abandonment, will in every case, where the work is completed, give title to the water against subsequent claimants."

Here there was a written notice stuck up a little way below Hanging Rock at the point called Middle Rock. At and above Hanging Rock the contour of the Reservoir was marked with stakes on each one of which was written "Water Line of Provo Canyon Reservoir" and that at Hanging Rock was 85 feet above the water level. When the railroad surveyed its line the plaintiffs in error were at work with a large force of men at this point clearing the land for flumes, digging and making ditches and places for flumes; this was all the notice that was necessary or possible and the railroad company had actual notice of the intent and purpose of the plaintiffs in error.

A dam 25 feet high would submerge the land involved in the controversy and probably any dam at Hanging Rock would submerge it, therefore the question is not so much whether we have a right to put an 85 foot dam in there as to whether we have a right to place any dam there whatever.

3. The defendant in error, plaintiff below, made no case entitling it to recover in the court below. It claimed under the statute of March 3rd 1875, 18 Statutes at Large, page 482. Supplement Rev. Stats. 91. It will not be necessary to reproduce the whole statute, but we do copy the first and fourth sections, both of which have been much commented upon by the courts.

Sec. 1. "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent to one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn outs and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and hereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: *Provided*, That if any section of said road shall not be completed Within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

It will be observed that the first section simply requires that the railroad company shall file copies of the papers of incorporation and due proof of its incorporation and thereupon a right of way 200 feet wide is thereby granted through the public lands; but evidently, mere filing of these articles does not secure the particular line

of way or part of the canyon upon which the railroad is to be built. hence it could not be the creative title itself; the canyon may be very wide; many canyons are ten miles from one side to the other, and there is no part of line that canyon specially granted; in fact, the first section standing alone, does not relate to canyons; that subject is to be found in the second section; this section would merely give the plaintiff a right of way from Provo over the public lands to Duchesne. But *what particular* right of way? The statute does not grant all the lines or all the public lands or exclude others from the exercise of the right to occupy the public land, but simply licenses the privilege of building. It is evident from the nature of the improvements to be made, the particular land is not granted until otherwise designated; and so we find in section four the method by which the right of the railroad to a particular piece of land is to be determined, viz: The railroad must file a profile of its road with the register of the land office of the district where the line is located; until then no designation has been made of the particular lands involved—no segregation from common domain—no location whatsoever until thus located; the special description of land is granted to the railroad as to any homesteader who shall define his homestead or any miner who shall discover mineral. The general mining law grants to any miner the right to use and acquire and own the mining claims on discovery of a vein; but that does not grant all the public domain; he must discover, identify and specify what it is he claims. So the railroad must specify and identify the particular line of road on which it is to be built; it must furnish a profile and map; until then the grant is ambulatory; it is any particular 200 feet not otherwise occupied. When the railroad files its profile or map, then it becomes a definite, fixed, certain 200 feet; that

which was simply in the class before, becomes a definite grant on the land after filing of the profile, and not until then. The statute requires not only the filing of the profile but the approval of the Secretary of the Interior to that particular plat. The question has been frequently before the courts, and I believe it has been uniformly held that no right exists until the profile is filed. In many cases the rule goes further, and requires the approval of the Secretary of the Interior. The Government issued a circular when Senator Thos. H. Carter was Commissioner, prepared by him, issued March 21, 1892, in which the foregoing views are contained, and to which reference is made, and the decisions of the Supreme Court and the local courts are in harmony with this view.

The Act of 1875, is not in the nature of au absolute grant to a particular company, it is simply an offer to the public.

> "Which takes effect and becomes operative as a grant to a particular company, *only when it accepts its terms by a compliance with the conditions precedent prescribed in the act itself.*"
>
> Red River & Lake of the Woods R. Co. vs. Sture, 20 N. W. 229.

To constitute a present grant there must be a present grantee qualified to take according to the terms of the law. His title does not vest until he has performed all conditions.

> Hall vs. Russel, 101 U. S. 509.

Before any railroad company can acquire any rights under the Act of 1875, as against one in possession of the land in question, it must show a strict compliance with all the terms of the act.

> Larsen vs. Oregon Ry. & Nav. Co. 23 Pac., 966.

Under this act no railroad company can claim to be a grantee of a right of way over the public lands, until a profile of its road has been filed and approved as therein specified. But even then the grant would not be operative upon lands to which private rights had previously attached.

Enoch vs. Spokane Fall & N. Ry. Co., 33 Pac. 966.
Spokane Falls & N. Ry. vs. Zeigler, 61 Fed. 392, S. C. 167 U. S. 66.

Under the act of 1875 the filing of a profile of its line, is a condition precedent to the initiation of any right in the railway company's favor.

Lilienthal vs. Southern California R. Co. 56 Fed. 701.

And the rule is carried still further in the case of Jackson vs. La Moure County, 46 N. W. 449, where it was held that title to certain indemnity lands does not pass to a railroad company until the company selects said lands and such selection has been approved by the Secretary of the Interior.

Reliance has been made by the defendant in error upon the case of Washington & Idaho Ry. Co. vs. Coeur D'alene Ry. Co., 160 U. S. 77. In that case, however, the railroad company which had not filed any map or profile of the road had actually built a road and was actually in possession with a railroad of the land involved: exactly what has not been done here. This is a mere intention not created by the railway company or entertained by the railroad company itself; merely a tentative survey—seeing if a road could be built. This line has never been adopted by the corporation itself or any officer of it. The directors have never adopted it; they never filed any alignment or profile or indicated by any line or profile that they intended to

take this particular piece of land. The surveyor had stuck his stakes that was all to indicate any intention on their part to take this particular piece of land. Under these circumstances the case quoted by this court in Washington & Idaho Ry. Co. vs. Coeur D'alene Ry. Co., of New Brighton Railroad Co. vs. Pittsburg Railroad Co., 105 Penn. St. 14 becomes particularly applicable.

> "A preliminary survey though well marked by a line of stakes indicating the location of the railroad cannot be regarded as sufficient notice of a prior legal appropriation of the line."

This is the language of the syllabus in that case. The location of this line by that surveyor was entirely unauthorized by anybody. The other case referred to Morris and Essex R. R. Co. vs. Blair et al. N. J. Eq. page 645, is equally pertinent.

> "It may be true that the complainants first actually surveyed in the passes where the conflicts occurred, although there seems to be some doubt on this subject. But, assuming it to be true, the mere experimental surveying of a route, will not confer any vested or legal right, until it shall have been adopted. Until then the company is in no wise committed to do it. If done by their direction, they may change their mind and go elsewhere. It may be the mere act of their engineer, and he may recommend it or not. If he should, the company may reject it and select another route. Although the complainants, therefore may have first surveyed the conflicting passes in the mountains, yet the Warran company afterwards surveyed the same passes, and first adopted the route, and first filed their survey in the office of the Secretary of State. This gave them a legal right to the route surveyed, and in my view, excluded the complainants from occupying the same lands."

How accurately this describes the situation in the case. These railroad surveys of this railroad company, amount

to nothing; they have already made one preliminary survey on one side, and although they made a map of that one,—abandoned it. *The railroad company nor any officer of plaintiff ever adopted any of it.* (Railway Co. vs. Alling 99 U. S. 475.) This particular piece of land which the plaintiff seeks to quiet title in this suit, has never been selected by the railroad company as its land—it has neither possession or inchoate title. It has never signified to the United States Government that it has selected that piece or its desire to use it for the purpose of a railway. The possession of a railroad was strictly and purely a work of fiction. It was the defendants who were in actual possession,—a possession that they exercise to the exclusion of the plaintiff. They were working on this very reservoir which they had staked out and fenced in; as it were,—and when the railroad attempted to divert the waters of the creek in such a way as to injure the operations of the defendant they had force enough to stop them. When the workmen of the railroad company started on the eighth day of September to blast out the rocks which were parts of Hanging Rock which was part of the dam,—defendants were in possession to stop them,—that work was within the staked boundaries.

The defendant in error claims that the transfer from the north to the south side of the river was not a substantial change of its line but was only a local variation, the change was for a distance of four miles. It never run any full line clear through; never built any road whatever. Whatever the rule might be in case the railroad company had brought some action involving its entire line of road, it has seen fit to select a simple section three thousand feet long out of this line and sue us for that particular three thousand feet. It cannot be said that its title to that particular three thousand feet segregated from its entire line

was created until they had actually made some survey of it and no survey was made of it until July, 1896. The defendant in error treats the change from the north to the south side as trivial and unimportant thing when applied to the railroad company, but if it is trivial in the line of the railroad it is equally trivial in the slight change of the location of the dam from Middle Rock to Hanging Rock; feet; an appropriation at the former is substantially the same as one at Hanging Rock; the intent to appropriate the waters of the stream and the bed of the canyon is equally apparent. A dam at either place such as was contemplated would flood the particular land in controversy and an 85 foot dam at Middle Rock or a 60 foot dam there would flood this land. Any dam at Hanging Rock would flood it. The intent to appropriate the bed of the canyon for a reservoir was apparent on every hand and had been apparent for more than a year before the railroad attempted any survey.

II.

To entitle the railroad company to obtain a right of way over the lands of the United States it must have a franchise from the state authorizing it to build a road in that particular locality. As this court says in Washington & Idaho Ry. Co. vs. Cour D'alene Ry. Co , 160 U. S. page 99;

> "We are unable to accept such a view of the law, but concur in the conclusion of the court below that the language of the Act of Congress, under which both parties claim, wherein it provides that 'the right of way through the public lands of the United States is hereby granted to any railroad company duly authorized under the laws of any State or Territory, which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of a hundred feet on each side of the central line of said

road, plainly means that *no corporation can acquire a right of way upon any line not described in its charter or in its articles of incorporation;* and that it necessarily follows that no initiatory step can be taken to secure such right if any by the survey upon the ground or otherwise: that until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff company its acts of making surveys were of no avail; and that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if its survey of October 28, 1886, had not been made."

1. To determine whether this line of road was described in the charter of the Rio Grande Western Railway Co. we must refer to the organization and consolidation: The Rio Grande Western Railroad Co., at the time of its consolidation, provided for building nineteen separate, distinct and different lines in the State of Utah—each one of them a separate railroad of itself and some additional branches. Your honors were furnished with a copy of their articles of association, and it is useless to go over each of these lines in detail.

The first was from Ogden to a point in Washington County, in the south end of the Territory.

The second was to the mouth of Clear Creek, in Sevier County to the south part of the Territory in Kane County.

The third, from the mouth of Clerk Creek, to the City of St. George.

The fourth was from Iron Spring, Iron County to the west boundary of the State.

The fifth, from Cove Creek Fort, Millard County, to the west boundary of the State, with collateral branches.

The sixth, from Salt Lake City to the west boundary of the State.

Seventh, from Lehi to the west boundary of the State.

Eighth, from Springville to the west boundary of the State.

Ninth, from Salina, Sevier County, to the west boundary of the State.

Tenth, from Deseret, Millard County, to the western boundary of Utah.

Eleventh, from Salina, Sevier County, to the mouth of Thistle Valley.

Twelfth, from Provo to a point on the eastern boundary of Utah where the same is crossed by the valley of the White River, with four branches: 1. The branch from the mouth of White River to the eastern boundary where the same is crossed by the Green River. 2. A branch from a point near Soldier's Pass, in Wasatch County, to the mouth of Huntington Creek, Emery County. 3. A branch from the mouth of White River, Uintah County, to Kimball's Station in Summit County. 4. A branch from the mouth of White River, to the mouth of Grand River.

Thirteenth, from Ogden to Salina, Sevier County, thence in a southerly direction to the north boundary line of Arizona, defining the lines through which it should pass.

Fourteenth, from Salt Lake City to Park City.

Fifteenth, from Provo to the mouth of Duchesne Fork.

Sixteenth, from the railroad between Salt Lake City and Draperville to Bingham Canyon.

Seventeenth, from the railroad between Salt Lake City and Draperville to Alta.

Eighteenth, a line of railroad beginning at Dead Horse Crossing, Price River, to a place called Blake City.

Nineteenth, from Pleasant Valley Junction through Fish Creek Canyon to Pleasant Valley to Winter Quarters Coal Mine.

Making with branches and all between 20 and 30 lines of road; of these, the plaintiff in its complaint, claims that two would pass up Provo Canyon, and alleges (Folio 3) that these lines are as follows: The line from the City of Provo in Utah County to a point on the eastern boundary line of Utah where the same is crossed by the Valley of the White River, passing into or through the Counties of Uintah, Wasatch and Utah. It also alleges that it claims the line from a point at or near Provo, in Utah County, to a point at or near the mouth of Duchesne Fork on the Uintah River, Wasatch County, passing into or through the Counties of Utah, Wasatch and Snmmit. The plaintiff itself speaks of being authorized to construct and operate various lines of road. It has constructed from time to time some of these numerous lines.

Upon these two lines described in the complaint, no work had ever been done whatsoever until the spring of 1896, within the meaning of the statute above referred to; the plaintiff had not begun the construction of either of these two lines of road. The period from its organization is seven years, from the passage of the amendment of 1892—four years. Both under the amendment and the original law, the design of the statute was, that labor should be begun upon each of these roads or lines of roads within the two years, or else the location and franchise should be open to some other person or railroad to occupy. The object of the statute is to prevent the railroad from organizing and claiming a franchise and then by doing no work exclude other roads from availing themselves of the opportunity of obtaining a franchise under the statute. As long as one road has a franchise to build upon the public land, it is a menace to other roads, and prevents them from operating. To remedy that evil, was the purpose for which this statute was passed. It is no answer that plain-

tiff has built some other line of railroad,—that it has constructed a line from Ogden to Salt Lake and from Salt Lake to the eastern boundary of the State through some other canyon than that of Provo, and that it has constructed a road from Thistle to Marysvale. These are distinct, separate rights,—franchises of a different kind. This railroad was organized under the provisions of and was a consolidation under Secs. 2360, 2361, 2362 and 2363 of the Compiled Laws of 1888. Such consolidated company could acquire no new rights there at all, further than belonged to the two roads of which it was composed; each of those was organized under the laws of 1876, pages 195 and 218. An examination of the provision and intention of these railroad statutes, show that the legislature intended to require of each company a certain amount of payment to be made per mile—certain steps to be taken to insure the good faith of the undertaking. While the railroad was permitted to name its own route or routes, it could do so only by complying with these conditions; the consolidated company was equally bound to comply with the conditions. It would appear that the predecessor of the plaintiff had chosen a variety of routes all through the states, perfect octopus—a route in every direction, in opposite and in parallel lines; if we are to assume to know the geography of the country, they attempt to run up every canyon in Utah. The evidence in this case shows that by their different routes, they undertook to parallel and go through and monopolize every available canyon between the valleys of Salt Lake and the east; they have a line everywhere; each of these lines is a distinct one; they are placed as such in the articles of incorporation, and the evidence shows that they are distinct, and in many instances, conflicting lines. These different routes belong to plaintiff only by virtue of the authority contained in

consolidation; that consolidation is subject also to the provisions of Section 2362, Compiled Laws of 1888, which provides that any corporation thus created—

> "Shall possess all of the rights, privileges and franchise and be subject to all the restrictions, disabilities, duties and liabilities of each of said corporation so consolidated."

Yet the progenitors of this new infant, the plaintiff, took subject to section 46 of the original laws of 1876, page 217, which provides:

> "If such railroad company shall not within two years after filing its original articles of association begin the construction of its road, and expend thereon at least five per cent. of the amount of its capital stock, and finish the road and put the same in full operation within six years, its act of incorporation shall be void."

The same provision is re-enacted in the Session Laws of 1888, Section 2358, s 44 (Compiled Laws p. 33), only the time for putting the road in operation is ten years instead of six.

The road from Provo to Duchesne, or any other of the branches specified by the witness Yard, which must go by Provo Canyon, are named in the articles of each of the company as distinctly lines of road. The plaintiff and its predecessors had the privilege to build on other lines but also had the privilege to build on these two lines together up Provo Canyon; it is not pretended that within two years after the filing of the original articles of their progenitors or within two years after the filing of the articles of association of plaintiff itself, that any work whatever was begun upon any line of railroad leading up Provo Canyon.

It is not pretended that within six or ten years after the organization of the progenitors of plaintiff any road

whatever was finished, because it is claimed by plaintiff that it has not yet completed any of its road, it is still claimed to be in the process of completion under the original articles; it is shown that not one effort was made even to survey or build a single inch on this particular line of road for more than ten years after the organization of either of the progenitors of plaintiff. We then have before us the question whether this provision is to be enforced against the railroad. The legislature placed it there for a wise purpose to prevent railroads working out and claiming lands and routes which they do not occupy and thus monopolizing and preventing other railroads from building on these routes; unless such companies intend to build and did actually build such railroad. The act for the organization of railroads is a liberal one; it permits the railroad to select its entire route, but as a condition, it prescribes that it shall go to work on that route within two years, and complete it within ten. This provision is a condition precedent; the railroad can acquire no right until it shows that it has performed this condition precedent; it does not require action of the State to set aside any grant or interfere in any manner; non-compliance with the condition of the statute, is the same as if the right to build in this canyon, had never been granted to the railroad. The plaintiff could acquire no right in Provo Canyon, unless it had a charter from the Territory of Utah to build a railroad up there; its charter was granted more than ten years before any of the proceedings in this case; and it prescribed as a condition precedent that the road should be commenced within two years and finished within ten; it was not done; it therefore had no right whatever. The question has been decided in the following cases:

In re Brooklyn Winfield & Newton Ry. Co., 72 N. Y. 245.

Bywaters et al. vs. Paris & G. N. R. R. Co., 11 S. W. 856.

Morris and Essex Ry. Co. v. Central Ry. Co., 31 N. J. Law 205.

Commonwealth vs. Lykens Water Co., 110 Penn. St. 391.

Detroit &c. R. Co. vs. Detroit Suburban Ry. Co., 103 Mich. 585; 61 N. W. 880.

Peany vs. Calais Ry. Co., 30 Maine 498.

Thompson's Corp. Secs. 6589, 6590, 6582, 6587, 6588.

Each line becomes separate and distinct from each other, each one as if it was a different corporation. Within the purview of this statute, each is segregated; the forfeiture can only apply to separate lines, and not to all. In Oakland Railroad Company vs. The Oakland, Brooklyn and Fruit Vale Railroad Company, 45 California, 365, under a statute which provided that "if the provisions of this act are not complied with, then the franchise and privileges herein granted shall cease and be forfeited;" the company acting under that charter had built its railroad on certain streets on certain parts of the grant, but had not built upon others; the right to those upon which it had not built was involved in the controversy. The court said:

> "No question arises in this case in reference to the plaintiff's right to maintain and use the railroad track constructed by it within five years after the date of its grant. But no track having been constructed, and no steps taken towards constructing one along the east side of Broadway within the time limited by the act, the question is presented as to what rights the plaintiff acquired on that side of the street, and what, if any, it still retains." (Page 372.)

Holding in another part of the opinion, that the clause was self-acting as to those streets not occupied.

While commenting upon the California authorities, I wish to call the court's attention to the fact that the case of Santa Rosa City R. Co. vs. Central Street Ry. Co., 38 Pac. 986, has not been published in the California Reports as it is in the Pacific Reports. A re-hearing was granted in that case by the same bench that rendered the opinion, and subsequently the court divided equally upon the opinion, so that no opinion was ever agreed upon in the California Court. (See same title, 112 Cal. 436.) That citation goes for nothing even in California.

I call attention to the hardship that would be inflicted if it were the intent of the Legislature that all the lines should be forfeited or none. If it were true that that statute were to be considered to apply to the whole corporate existence and not to any particular line—then if the D. &. R. G. Co., did not complete all the roads described in its charter—its 20 odd lines—within ten years after its existence—all would be forfeited to the State—its property would be forfeited to the State, as well as all its rights—its corporate existence would cease. It cannot be that such an outrageous and unreasonable construction can be applied.

Southerland on Construction, Secs. 323, 324.

If, on the other hand, we consider that the statute meant that each *particular* line shall be forfeited unless completed within ten years, then such construction is just; it is just to the public and just to the railroad company which loses no property, because it is unable to keep the franchise open which it has not exercised or built upon, or begun the construction upon, any one of these lines can be built within ten years—but the whole system could not, probably, be built within 100 years The injustice to the railroad company in forfeiting its whole existence by failure

to complete its whole system within ten years, would be equally great, whether we consider the clause as self-acting, or as requiring the action of the State.

The charter gives a mere license—a permission to build; if the corporation sees fit not to exercise the license or accept the permission, it no longer has any right to that franchise. This is the principle; this question is equally applicable to a branch of a railroad as to the whole road. In some of the cases cited, it will be seen that the franchises have been given to street railways to build on certain streets; the failure to exercise that within the time limited by statute is a prohibition to enter on such streets.

It would be seem from the testimony and line of argument put in here, that the plaintiff claims that building the road on some other line, relieves it from the necessity of building on this particular line up Provo Canyon; but each one is a separate road, and of itself, a separate line. Nor is the argument improved by saying that it is all a part of one line or system of road; the statute equally prescribes as a condition precedent, that the railroad shall be completed within ten years. These grants were given to the predecessors of the plaintiff more than ten years before 1896.

We therefore, say, in answer to the first question, that plaintiff has no charter to build a railroad up Provo Canyon. That being so, it could not acquire title to any land up there. And for that reason, the motion for a non-suit should have been granted, and the findings of fact are unauthorized; the finding of fact that it had complied with all the conditions, is unauthorized, and the fact that it had a right to take land in Provo Canyon, is untrue.

2. The plaintiff in this case shows neither actual possession nor title. Such possession as will entitle plaintiff to recover in an action to quiet title without title, must be

a pedis possessio. The premises must be in actual use—actually occupied. Not having possession, the plaintiff must show title by a legitimate instrument of title.

An action to quiet title cannot be maintained without clear proof of either *pedis possessio* or *legal title* in the plaintiff--an equitable title is not sufficient.

Stark vs. Starrs, 6 Wallace, 409.
Frost vs. Spitle, 121 U. S. 552.
Fussell vs. Gregg, 113 U. S. 550.
Orton vs. Smith, 1 Miller, 218 (18 Howard 263.)
Jackson vs. La Moune County, 46 N. W. 449.
Goldberg vs. Taylor, et al., 2 Utah, 496.
Parker vs. Stevens, 59 N. H. 203.
Drachenfels vs. Doolittle, 77 Cal. 295.
McGrath vs. Wallace, 85 Cal. 622.

III.

This case was clearly removable from the State to the United States courts:

1. It involved the construction of these two Statutes of the U. S. and the rights under each. It falls exactly within the decision of your honors in the case of Spokane Falls & N. Ry. Co. vs. Zeigler, 167 U. S. 72, where the court says:

> "The plaintiff's complaint, therefore, disclosed the case of a contest between a settler claiming the title under the laws of the United States and a railroad company claiming a right under an act of Congress; and of such a case the Circuit Court for the District of Washington clearly had jurisdiction. Doolan vs. Carr, 125 U. S. 618, 620; Cook vs. Avery, 147 U. S. 375."

2.—In the District Court the defendants, the Telluride Power Transmission Company and L. L. Nunn, petitioned for the removal of said cause to the United States Circuit

Court in and for the District Utah. This petition was filed in due time before any answer was filed. (Trans. Fol. 485-487.) The petition avers that the amount in dispute exceeds $2,000; that the suit is of a civil nature, that the said petitioners were at the time of the commencement of this suit and still were citizens and residents of the State of Colorado and that the plaintiff was a citizen and resident of the State of Utah; that there was in said suit a controversy wholly between the petitioners and the plaintiff. That the said defendant Holbrook has no interest whatever in said controversy and claims no interest in and to the land in controversy and as "petitioners believe, and therefore aver, was named as one of the defendants in said cause with a view of conferring jurisdiction upon this court to try and determine said controversy, and that his presence is not necessary to quiet the title to said property or determine the controversy involved in said suit." This petition together with a proper bond was presented to the district court of the State and a removal demanded and the court denied this motion. (Trans. Fol. 490.)

To determine the question as to whether the State court has jurisdiction of this case in view of this petition it is necessary to examine the record as it then stood. The complaint was framed under the statutes of Utah to quiet title to real estate. It alleged the two ultimate facts: that the plaintiff was the owner of the premises described in the complaint; and that the defendants claimed some interest therein. This is all that is necessary for the plaintiff to allege under the Statutes of Utah and it is not necessary to set out in detail what the plaintiff's claim is, or what pretended claim the defendants have. It is sufficient to allege the two ultimate facts as conclusions.

Parley's Park Silver Mining Co. vs. Kerr, 130 U. S. 256-260.

The complaint does allege in detail the claim of the plaintiff; as to the defendants, the only allegation is as follows:

> "And on information and belief the plaintiff alleges that the defendants wrongfully make, set up, and assert an adverse claim to said lands so owned by the plaintiff, and in pursuance of their said adverse claim have interrupted the plaintiff in pursuing the work of grading for its railroad on and over said lands, and by threats of force have stopped the plaintiff's work at places thereon and deny the right of the plaintiff to use said land for railway purposes:"

And prays as follows:

> "Wherefore plaintiff prays that the defendants be required to set forth the nature and extent of their adverse claim to the lands aforesaid; that their adverse claim be adjudged unfounded; that the title and right of possession of the plaintiff be confirmed, and that the defendants and all persons acting for them or claiming under them or either of them be restrained from asserting any adverse claim to said lands or the possession thereof." (Trans. Fol. 6 7.)

We do not claim that for the purpose of removal the plaintiff's claim can be other than that set forth in the complaint, but this complaint does not set forth any particular title, or claim of title, of the defendants, or any of them. It does not seek to attack any particular claim they have upon the land, but it is an open challenge to all the defendants, requiring them to come forward and make any claim they have. Under this complaint each of the defendants might have come forward with distinct and separate claims adverse to the plaintiff and adverse to each other. At the time of filing the petition it still remained an open challenge to them and the allegations of the petition that the controversy between the plaintiff and the two

petitioners was a separable one in no way disputes the complaint. Such a complaint upon the question of removal is not to be considered the same as a complaint upon a contract against joint contractors or in tort against joint wrong doers.

Stranbrough vs. Cook, 38 Fed. 369-373.
Bacon vs. Felt, 38 Fed. 870-872.

The case of Stranbrough vs. Cook, supra, was an action to quiet title under a statute similar to the Utah statute, and Judge Shiras, speaking of the complaint in that cause upon a petition for removal says:

> "The petition is not framed for the purpose of narrowing down the issues triable thereon to one title or source of title, but, on the contrary, brings all the named parties into the suit as defendants, for the purpose of adjudicating every adverse interest or claim to the realty, no matter how diverse or antagonistic to each other they may be. The decisions; therefore, defining the rule applicable to suits based upon joint or joint and several causes of action, do not touch a case of the peculiar character before the court, for the reason that the petition in this cause does not seek to declare against all the defendants jointly. * * * * The petition for removal avers that the said Susan and Lucy Daniels will each by answer claim to be the owners of the property in fee simple, so that it is thus made to appear the suit involves more than one controversy."

As to the character of the action and the claim of the plaintiff, and if the complaint upon its face shows that some particular claim on the part of the defendant is being litigated or attacked, then the complaint itself is undoubtedly conclusive as to the character of the controversy, but there are matters involved in the removal of a cause in which the complaint is not conclusive, and upon these matters in the State Court, the petition is conclusive, and

it is upon the record thus made up, the complaint and petition for removal, that the State Court acts, as to the citizenship of the parties, the amount in controversy, and the character of the defendants claim about to be set out in the action to quiet title, the petition speaks for itself in the State Court, and if taking this record upon its face it shows a right to removal, the State Court has no further jurisdiction but should remove the cause to the Federal Court. The petition for removal does not controvert the complaint, but is entirely consistent with it. These matters of fact which are set up in the petition may be controverted by plea and tried in the Circuit Court, but, not in the State Court.

Burlington Etc. Ry. Co. vs. Dunn, 122 U. S. 513.
Stone vs. South Carolina, 117 U. S. 430-432.
Gold Mining & Water Co. vs. Keys, 96 U. S. L99.

If upon the removal of the cause to the United States court, when the answers of the defendants came in, if it should be then shown that there was no separable controversy between the petitioners and the plaintiff, whenever that was made to appear the Circuit Court should remand the case to the State Court.

Connell vs. Smiley, 35 U. S. 341.

The petition also alleged that the defendant Holbrook who was a resident of Utah was made a party defendant by the plaintiff only for the purpose of preventing a removal to the United States Court. This was a fact alleged upon the record and which could only be tried in the Circuit Court, but it was a tender of proof to that effect, but was disregarded. It was proper to make this allegation and it was cause for removal.

Louisville etc. R. Co. vs. Wangelin, 132 U. S. 599-603.

After the petition for removal had been denied by the State court defendants filed their answer (Trans. Fol. 11-25) and in that answer the defendant Holbrook disclaimed any interest in the premises, and the other defendants set up their claim as had been alleged in the petition; they thereby joined separable issue with the plaintiff, and they again in their answer object to the jurisdiction of the State court and claim the right of removal. And the court in passing upon the issues in its 22nd Finding of Fact (Fol. 38) finds as follows:

> "The defendant Holbrook disclaims personal interest, but denies the right of the plaintiff. The other defendants have made and make an adverse claim to the lands in controversy as set out in their answer."

The fact that Holbrook was joined only for the purpose of preventing a removal of this cause into the United States court is thus made apparent. He was made and retained a party in this case simply because as a bystander and having no interest in the matter, and not claiming any interest, he had expressed an opinion that the plaintiff was not entitled to maintain the action. Upon the record presented to the State court defendants were entitled to a removal of the cause.

ARTHUR BROWN,
H. P. HENDERSON,
Attorneys for Plaintiffs in Error.